FILE COPY

FILED
DEC 29 1958
JAMES R. BROWNING, Clerk

No. 516

IN THE

Supreme Court of the United States

October Term, 1958

SPRINGFIELD TELEVISION BROADCASTING CORPORATION

and

GREENFIELD TELEVISION BROADCASTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,
THE TRAVELERS BROADCASTING SERVICE CORPORATION,
and THE WGBH EDUCATIONAL FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE TRAVELERS BROADCASTING SERVICE CORPORATION IN OPPOSITION

PERCY H. RUSSELL
ALOYSIUS B. McCABE
of
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
800 World Center Building
Washington 6, D. C.

Attorneys for Respondent,
The Travelers Broadcasting
Service Corporation

December 29, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Questions presented	2
Statement of the Case	3
Argument	13
1. The Court below properly decided that the Commission's decision was within its authority and comported with applicable statutory procedures	13
2. The decision below is not inconsistent with this Court's decision in the Chenery case	20
3. The decision below raises no questions warranting further review by this Court	21
4. This Court's action in cases Nos. 235 and 242 (Oct. Term 1958) does not require vacation of the decision of the Court below	22
Conclusion	23
Appendix A	24

CITATIONS

CASES:

Federal Communications Commission v. *Allentown Broadcasting Corporation*, 349 U.S. 358	15
Federal Communications Commission v. *Pottsville Broadcasting Company*, 309 U.S. 134	15
Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470	18
Federal Radio Commission v. *Nelson Bros. Bond and Mortgage Company*, 289 U.S. 266	15
Federal Trade Commission v. *American Tobacco Company*, 274 U.S. 543	21
Logansport Broadcasting Corporation v. *United States*, 210 F. 2d 24	19, 22

Page

National Broadcasting Company v. *United States*, 319 U.S. 190 22
N.L.R.B. v. *Pittsburgh Steamship Company*, 340 U.S. 498 21
Peoples Broadcasting Company v. *United States*, 209 F. 2d 286 .....19, 22
Philadelphia Company v. *Securities and Exchange Commission*, 175 F. 2d 808, dismissed as moot, 337 U.S. 901 19
Sangamon Valley Television Corp. v. *United States*, No. 235 (Oct. Term, 1958) 3, 22
Securities and Exchange Commission v. *Chenery Corporation*, 318 U.S. 80 20
Securities and Exchange Commission v. *Chenery Corporation*, 332 U.S. 194 19
United States v. *Storer Broadcasting Company*, 351 U.S. 192 22
United States v. *WOKO, Inc.*, 329 U.S. 223 21
Van Curler Broadcasting Corporation v. *Federal Communications Commission*, 236 F. 2d 727, cert. den., 352 U.S. 935 .....20, 22
Willapoint Oysters v. *Ewing*, 174 F. 2d 676, cert. den., 338 U.S. 860 19
WIRL Television Co. v. *United States*, No. 242 (Oct. Term, 1958) 3, 22

AGENCY DECISIONS:

First Report on Deintermixture, 13 R.R. 1511 6
General-Times Television Corporation, 11 R.R. 625 6
Second Report on Deintermixture, 13 R.R. 1571 ..7-8, 19
"Sixth Report and Order," 1 R.R. 91:601 ..... 4, 5
The Travelers Broadcasting Service Corporation, 12 R.R. 689 5

STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. 1001 *et seq*:
Section 4 .....2, 7, 18, 20

Federal Communications Act, 47 U.S.C. 151 *et seq*:
Section 303(g) 2, 12, 13
Section 307(b) 2, 12, 13, 15

Page

Rules and Regulations of the Federal Communications Commission, 47 CFR 1 *et seq*:
Section 3.606 3

MISCELLANEOUS:

Broadcasting Magazine 5, 17, 18

In re Application of Triangle Publications, Inc., FCC Docket 12275 16

Application for Assignment of License of WHCT, Hartford, FCC File No. BALCT-76 18

IN THE

Supreme Court of the United States

October Term, 1958

No. 516

SPRINGFIELD TELEVISION BROADCASTING CORPORATION

and

GREENFIELD TELEVISION BROADCASTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,

THE TRAVELERS BROADCASTING SERVICE CORPORATION,
and THE WGBH EDUCATIONAL FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE TRAVELERS BROADCASTING SERVICE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 259 F. 2d 170. The basic decision of the Federal Communications Commission (R. 751-760) is reported at 22 F. C. C. 332. The Commission's Memorandum Opinion and Order denying reconsideration (R. 869-872) is reported at 23 F. C. C. 57.

JURISDICTION

The judgment of the court below was entered on June 19, 1958. By order of the Chief Justice, the time for filing a petition for writ of certiorari was extended to November 15, 1958. The Petition was filed November 14, 1958. The time for filing a response was extended to December 29, 1958. Jurisdiction of this Court is found in 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

STATUTES INVOLVED

In addition to the statutes set forth in the Petition (p. 3), Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), provides in pertinent part as follows:

> "*Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose . . ."

QUESTIONS PRESENTED

In the opinion of Respondent, The Travelers Broadcasting Service Corporation, the Petition presents the following questions:

1. Whether the rule making proceedings resulting in the Commission's decision to leave in effect its previous allocation of Channel 3 to Hartford, Connecticut, contravened the requirements of Sections 303(g) and 307(b) of the Communications Act, as amended, 47 U.S.C. 303(g), 307(b).

2. Whether the court below properly decided that the Commission's decision was in all other respects consistent with the public interest standard and applicable statutory procedures.

3. Whether, on the facts presented, this Court's action in vacating the judgments of the court below in Nos. 235 and 242 (Oct. Term 1958) is relevant to the disposition of this case.

STATEMENT OF THE CASE

Petitioners[1] seek further review of a judgment of the court below affirming the Federal Communications Commission's decision not to disturb the allocation of very high frequency (VHF) television Channel 3 at Hartford, Connecticut, after a rule making proceeding in which it entertained comments *pro* and *contra* a proposal to amend Section 3.606 of its regulations so as to reallocate this channel to Providence, Rhode Island and substitute in its place at Hartford an ultra-high frequency (UHF) channel. The result of the action of the Commission was to leave in effect channel allocations to the central New England area originally made in 1952 as part of the nationwide television Table of Assignments promulgated at that time.

The action challenged here was but the most recent in a succession of allocation studies of the Hartford area by the Commission extending over more than a decade. At the inception of regular commercial television broadcasting after World War II, the Commission at first reserved two VHF channels (8 and 10) for use at Hartford, a city with a metropolitan area

[1] Petitioner, Greenfield Television Broadcasting Corporation, is a wholly owned subsidiary of Petitioner, Springfield Television Broadcasting Corporation.

population of more than 350,000 and the capital of Connecticut (R. 86). On May 6, 1948, July 8, 1949 and March 22, 1951, the Commission issued three different rule making notices relating to the allocation of television channels to Hartford, and other cities as well (R. 86-87). Since Travelers had been an applicant for a VHF television station at Hartford since September 10, 1947, it was vitally interested in allocations to that city. Accordingly, it participated extensively in all these proceedings by filing comments and reply comments, including detailed engineering and economic data justifying the allocation of VHF channels, including Channel 3, to Hartford (R. 86-88). On April 11, 1952, the Commission issued its "Sixth Report and Order" finalizing a nationwide allocation structure. 1 Pike and Fischer, *Radio Regulation* 91:601.[1] Because of its size and importance, the Commission concluded that Hartford required a VHF allocation, stating as follows:

> "It is our view . . . that the requests for the deletion of Channel 3 from New London in order to assign that channel to Hartford are meritorious and should be granted . . . The population of Hartford is more than 5 times the population of New London, and Hartford is presently without any VHF assignment. Moreover, the New London area would receive VHF service from stations located in Providence and New Haven; and if Hartford is assigned a VHF channel, New London would receive Grade A service from a station in Hartford. It is our view, therefore, that Channel 3 should be deleted from New London and assigned to Hartford." ("Sixth Report and Order", 1 R.R. 91:601, 91:707.)

---

[1] Hereafter cited as "R.R."

In the same Report and Order, the Commission for the first time allocated a number of UHF channels to Hartford and smaller cities throughout New England and other parts of the country.

Following release of the "Sixth Report", Travelers promptly amended its long pending application for a VHF channel at Hartford to specify operation on Channel 3 (R. 87). Other applications for the same frequency were filed and a lengthy comparative hearing to ascertain the best qualified applicant ensued, which was finally terminated in favor of Travelers in July, 1956. See *The Travelers Broadcasting Service Corporation*, 12 R.R. 689. Since the UHF channels allocated in 1952 were both more plentiful and less desirable from a techical standpoint (because of the admittedly less efficient propagation characteristics of the UHF *vis-à-vis* the VHF) these channels were promptly awarded, without contest, to a number of applicants, including Springfield Television Broadcasting Corporation, which obtained an authorization to construct a station on a UHF frequency at Springfield, Massachusetts in June, 1952, and commenced operation pursuant to this permit in March, 1953.[1]

The allocation of Channel 3 to Hartford remained unchallenged until October, 1954, when Springfield

[1] Since putting its station on the air at Springfield, the Springfield Television Broadcasting Corporation has constantly expanded the scope of its UHF operations, and is now licensed to operate UHF stations in Greenfield and Worcester, Massachusetts and Claremont and Lebanon, New Hampshire (Pet. 7). Almost from the outset, it operations have been profitable (R. 837). Petitioner recently announced in the trade press that its "October billing was 30% higher than any previous month in its 5½ year history." *Broadcasting Magazine*, November 17, 1958, p. 92.

Television Broadcasting Corporation and three other existing UHF stations in the Hartford and Springfield areas, who also had received their licenses without delay or contest and who foresaw increased competition when the Channel 3 licensing proceedings were finally resolved, filed a petition for rule making asking the Commission to delete the channel from commercial use at Hartford. The basis of the request was a contention by the UHF operators that actual use of the channel would prejudice their continued operations in the same area. Action on Travelers' application had already been delayed for seven years pending the Commission's allocation studies, and Travelers opposed this petition on the ground that the relief requested was wholly arbitrary and unreasonable. After considering detailed pleadings on the matter, the Commission denied the request for rule making on December 7, 1954. *General-Times Television Corporation*, 11 R. R. 625.

A month later, the same UHF stations renewed their petition and, after further written submissions, the Commission reconsidered its original denial to the extent of ordering a formal rule making proceeding to determine whether the public interest required retention of Channel 3 at Hartford. On November 10, 1955, after full consideration of the record made in that proceeding, the Commission once again denied the request to delete Channel 3 from Hartford where it had been allocated in 1952. *First Report on Deintermixture*, 13 R. R. 1511. Concomitantly with this action, the Commission instituted a nationwide allocation proceeding to study the possibility of assisting the further development of television broadcasting in the UHF part of the spectrum. Further comments were

filed in this proceeding by numerous interested parties. It was terminated in a Report and Order adopted June 25, 1956, in which the Commission outlined proposals for a long-range program of improving its nationwide television allocation structure and, at the same time, announced its intention to consider, on an interim basis, the reallocation of specific channels in selected parts of the country in order, where necessary and feasible, to ameliorate the competitive difficulties which had been experienced in some instances by simultaneous operation of UHF and VHF stations in the same cities. *Second Report on Deintermixture,* 13 R. R. 1571. As part of this interim proposal, the Commission once again (for the third time within two years) announced that it would consider the proposals —repeatedly pressed upon it by Petitioners—to delete Channel 3 from Hartford and reallocate it to Providence, Rhode Island (where two VHF stations were already in operation). Accordingly, the Commission again instituted a formal rule making proceeding, pursuant to Section 4 of the Administrative Procedure Act, to receive comments on the merits of the Hartford "deintermixture" proposal (R. 1-3). On the same day, it issued similar rule making proposals to consider interim changes in its table of television assignments affecting twelve other areas of the United States. *Second Report on Deintermixture,* 13 R. R. 1571, 1583.

In instituting the thirteen interim "deintermixture" rule making proposals, the Commission made it clear that the merits of each were to be weighed in light of the individual circumstances surrounding the specific communities involved. The Commission stated as follows:

> "Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community." *Second Report on Deintermixture,* 13 R.R. 1571, 1582.

In response to the Commission's rule making notice, voluminous comments and reply comments on the proposal to delete Channel 3 at Hartford were filed by Petitioners, Travelers, and numerous other interested parties. These comments comprised more than 600 pages of the record before the court below (R. 80-531, 539-720).

The opponents of the deletion of Channel 3 from Hartford, including Travelers, produced written evidence showing that, without service from Channel 3, substantial numbers of television viewers residing in the hilly areas surrounding Hartford would have no television service and additional large numbers of viewers would be confined to but one service and hence have no choice of program services. In support of this conclusion, Travelers submitted numerous on-the-spot field intensity measurements, collected and analyzed by qualified engineers, showing that in actual practice the behavior of UHF television signals in the Hartford area, because of the rough terrain, falls considerably short of the coverage *theoretically* possible for UHF under favorable propagation conditions.

The opponents also pointed out that in any event the proposed reallocation of Channel 3 to Providence was an impractical solution to that city's desire for a

third competitive television station. Such a move would not enable the Channel 3 station to comply with the Commission's minimum service requirements at Providence, would have the anomalous result of creating acute electrical interference problems within the City of Providence itself—because of the proximity of stations operated in Boston—and would adversely affect one of these Boston stations, operated by Respondent WGBH Educational Foundation. Television service, not only in Providence but also in the surrounding area, would thereby be impaired.

After full consideration of the voluminous comments submitted, a majority of the Commission issued a Report and Order on March 1, 1957 in which it concluded, in a lengthy detailed opinion, that on balance the public interest required the retention of Channel 3 at Hartford in accordance with the Commission's original decision of 1952 and its repeated later refusals to delete the channel (R. 751-60).

In its opinion, the Commission first listed the parties in interest who had responded to its notice of proposed rule making, related the problem in Hartford to its overall allocation studies, and stated once again that the criteria governing proposed changes in individual communities depended upon the "widely varying circumstances" of each (R. 752). Against this general background, the Commission then went on to consider in detail the evidence which had been submitted to it and to make findings and conclusions therefrom. The Commission first analyzed the distribution of television service in the southern New England area, and pointed out that despite the proximity of numerous large cities in Connecticut and Rhode Island, considerations of electronic interference had made it

possible to allocate only five VHF channels to the entire area, of which one is allocated to Massachusetts (New Bedford), two to Rhode Island (Providence), and two to the entire State of Connecticut (one at New Haven and one at Hartford) (R. 753).

The Commission next considered the problem of conversion to UHF receivers, and found that the rate of conversion in and near Hartford and Springfield-Holyoke is practically 100 per cent, but that it falls off sharply as one leaves the metropolitan areas of Hartford and Springfield-Holyoke. Many parts of Connecticut, including such cities as Waterbury, New Haven, Bridgeport, Winsted, Danbury, Willimantic and Torrington, have very low conversion rates (R. 753-754).

The Commission then took up the question whether, if Channel 3 were deleted from Hartford, significant numbers of persons would thereby be deprived of a needed television service because of the acknowledged inferior propagation characteristics of the UHF channel which would be substituted for Channel 3. The Commission carefully weighed Travelers' engineering submissions (R. 153-275) against rebuttal evidence of a technical nature which had been submitted by Petitioners (R. 691-716) and concluded that

> "There are, without doubt, throughout the areas of rougher terrain pockets where UHF reception is not satisfactory, as is shown by the low conversion rate in Litchfield and Tolland Counties (adjoining Hartford County on the west and east) where the residents apparently prefer fringe service from VHF stations. A station operating on Channel 3 in Hartford could fill in such 'white' areas in Massachusetts as well as Connecticut to a much higher degree than could a UHF station. A

> Channel 3 station would also be more likely to provide a second service to persons now limited to one television service, either UHF or VHF. The opponents estimate that the Connecticut area so limited would be 884 square miles with a population of 103,037. While for the reasons set out above we do not believe that the number will be as great as estimated, it is our judgment that the number will be substantial in view of the rugged terrain in part of the area." (R. 756)

Further, the Commission found that no similar problem of television reception existed in Rhode Island, since all of the state received at least two Grade B television services, and the City of Providence received service not only from its two local stations but from stations in Boston as well (R. 756).

In this technical context, the Commission next considered the relative size and importance of Hartford *vis-à-vis* Providence in terms of population, market rank, and rate of growth and concluded that under the criteria of "fair, efficient and equitable" distribution of television facilities required by Section 307(b) of the Communications Act, it could not find that Providence had a greater need for Channel 3 than Hartford (R. 756).

On the basis of the foregoing considerations, the Commission concluded that a shift of Channel 3 from Hartford to Providence would not be in the public interest. It went on, nevertheless, to make findings on still other objections to the proposed move arising out of the fact that Channel 3 in any event could not be utilized at Providence consistently with its Rules and Regulations because of the impossibility of finding a transmitter site which would comply with its mini-

mum separation requirements and at the same time provide coverage to Providence (R. 756-757). Finally, in view of all the foregoing determinations, the Commission properly concluded that it was both unnecessary and inappropriate to attempt to determine whether adoption of the proposed rule making would result in improving the opportunities for effective competition among as great a number of television stations as possible in the area (R. 757).

Petitioners sought review of the Commission's decision and its order denying reconsideration thereof (R. 869-872) in the court below on the grounds that the action contravened Sections 303(g) and 307(b) of the Communications Act and that the result reached was arbitrary and capricious in view of the evidence before the Commission and the factors it deemed decisive in its review of that evidence.

The court below, in an opinion by Circuit Judge Prettyman (Circuit Judge Bazelon concurring in the result), unanimously affirmed the Commission's action as in all respects consistent with the statute and with the obligations imposed upon the agency in the discharge of its rule making functions. After detailing the factual background of the long litigation concerning television allocations at Hartford and setting forth the contentions of the parties, the court concluded as follows (Pet. App. A 34):

> "In respect of petitioner-appellants' contentions we must note that Channel 3 was assigned to Hartford at the same time their UHF stations were allocated there; they took their licenses with full knowledge of the situation; they are trying to change an allocation which has existed as long as have theirs. So their argument in respect to the

> effect of this long-delayed grant on existing operations is unimpressive. The only difference between them is that their grants were made quickly and this one was contested by other applicants. In the next place we note that the Commission followed the procedural requirements for rule making, and this was a rule making proceeding. *In the third place we think the conclusions of the Commission were not only rational but reasonable.* The VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties. * * *" (Italics supplied)

Following release of the Commission's decision to retain Channel 3 at Hartford, it issued an unconditional permit to Travelers for operation on that channel (R. 943), and Travelers constructed and put into operation the television station which it had applied for about ten years previously. This station (WTIC-TV) has been on the air at Hartford, pursuant to the Commission's decision, since September 23, 1957.

ARGUMENT

1. The Court below properly decided that the Commission's decision was within its authority and comported with applicable statutory procedures.

Petitioners' principal contention (Pet. 15-21) here, as in the Court below, is that the Commission's failure to delete Channel 3 from Hartford and reassign it to Providence was inconsistent with its statutory duty under Sections 303(g) and 307(b) of the Communications Act, 47 U.S.C. 303(g), 307(b), to "encourage the larger and more effective use of radio in the public interest" and "to provide a fair, efficient, and equitable

distribution of radio services." Petitioners allege that UHF allocations are only "paper allocations"[1] in VHF areas and argue that the Commission's decision to retain Channel 3 at Hartford, in view of its possible impact on UHF stations there and elsewhere in New England, was arbitrary and capricious. The difficulty with this position is that the record before it and the facts on which the Commission's decision to retain Channel 3 at Hartford were based show Petitioners' assumptions to be incorrect, or, at the least, inapplicable to the Hartford area.

The Commission's decision to retain Channel 3 at Hartford was based on findings and conclusions that such action was necessary in order to assure a first and second reliable television service to substantial populations residing in the areas of rough terrain surrounding Hartford, and on the equally persuasive fact that the removal of Channel 3 to Providence would actually impair *existing* television service in and north of that city from stations already operating in Boston, as well as severely limit the effective use of the new channel. These conclusions were based on extensive evidence of a technical nature in the record before it. As the court below properly found, they were "not only rational but reasonable" (Pet., App. A 34). The Commission was entitled to consider the service advantages to the people of Connecticut under the existing channel allocations to that state and the service which would be lost if Channel 3 were deleted from Hartford, and to weigh these considerations against the need for a new VHF channel at Providence

[1] Petitioners' UHF stations, profitable almost from the outset (R. 837), have surely not been "paper only".

and the special requirements for such a channel created by interference conditions. *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company*, 289 U.S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134. The provision of service to undeserved areas is, indeed, of the essence of the Commission's considerations under Section 307(b) of the Act. *Federal Communications Commission* v. *Allentown Broadcasting Corporation*, 349 U.S. 358.

In view of these overriding service considerations, the Commission was clearly correct, under the facts before it, in rejecting Petitioners' contention that the deletion of Channel 3 was required for the future protection of its own and other UHF stations operating in the areas which would receive service from Channel 3 at Hartford. Moreover, there was no evidence in the record before the Commission to justify a conclusion that the advent of service from Channel 3 at Hartford would work the demise of these established UHF stations. The repeated contentions of Springfield Television Broadcasting Corporation (Pet. 7, 18) that its stations cannot "survive the advent of a *second* VHF facility in the Connecticut Valley" are completely at variance with the position it has strongly urged before the Commission in another proceeding. In the present case, petitioners represented that since WNHC-TV at New Haven (Channel 8) already rendered a VHF service to the Springfield area, the introduction of a Channel 3 signal at Hartford would result in competition from a *second* VHF station, which competition they could not survive. But when Springfield Television Broadcasting Corporation protested before the Commission

in December, 1957 the proposed move of the WNHC-TV (Channel 8) station approximately 14 miles closer to Springfield, it advanced the directly opposite argument that the use of Channel 3 at Hartford produces only the first VHF signal in the major portion of the service area of its stations and that the move of WNHC-TV would bring about for the first time a second competitive VHF signal. (See Protest of Springfield Broadcasting Television Corporation, *In Re Application of Triangle Publications, Inc.*, FCC Docket 12275).[1]

A further example of the complete variance of the petitioners' representations to the Commission and the courts from the real facts is shown in the recent (October 27, 1958) public statement of William L. Putnam, President of Springfield Television Broadcasting Corporation. In this public statement, made after the announcement of the affiliation of the Channel 3 Hartford station with the Columbia Broadcasting System, Inc., Mr. Putnam characterized as "pure hogwash" the claim which he himself had

[1] The protest of Springfield Television Broadcasting Corporation, filed with the Commission in opposition to the proposed move of WNHC-TV closer to Springfield (FCC Docket 12275), stated in part as follows:

> "The increased signal from WNHC-TV in Springfield proper, to the north of Springfield, and in the WWLP service area generally, will enable *many listeners to obtain for the first time a reasonably satisfactory service* from WNHC-TV, resulting in a loss of audience by WWLP to WNHC-TV. • • • In the past, the two Springfield UHF stations in competition with WNHC-TV had the advantages that WNHC-TV provided *only a Grade B signal in Springfield and not even that in significant portions of the UHF stations' coverage area.* Both of these advantages will be lost if WNHC-TV is permitted to move its transmitter site as here proposed." (Italics supplied)

frequently made and which his rival UHF station (Channel 40) at Springfield-Holyoke is now making that a UHF station in the Springfield-Holyoke market "cannot long continue" if Channel 3 is used at Hartford. Mr. Putnam further stated: "The fact that Springfield Television Broadcasting Corporation will gross more than $1 million in sales for the second year in a row should be ample evidence that we have provided and *can continue to provide successful competition to VHF stations in our market.*" (Italics supplied) He added: "And I can assure you that if I felt that WWLP could not survive VHF competition from Hartford, I would not have added another station, WRLP, nor the two translator stations we operate in northwestern New England, nor would I have revived WWOR in Worcester."[1] The stations referred to are all UHF.

Petitioners try to buttress their claim of the inability of UHF stations in the Connecticut River Valley to compete successfully with VHF stations by referring (Pet. 18 and App. B) to the present affiliation of Channel 3 at Hartford with the Columbia Broadcasting System, Inc. and by implying entirely speculatively that this affiliation will be the death knell of UHF Channel 18 in that city. But the actual events have belied this speculative forecast of doom. Following the CBS change in affiliation, several prospective buyers quickly applied for Channel 18, *even without a network affiliation,* and CBS made an agreement to sell its interest in the station to one of them for

[1] The statement of Petitioner's President, William L. Putnam, was in a letter to the Editor of *Broadcasting Magazine*, printed therein under date of October 27, 1958, p. 22. This letter is set forth in full as Appendix A.

$250,000. In the transfer application filed with the Commission, CBS stated that it had been "approached by a number of persons" who indicated a desire to buy and operate the station (Application for Assignment of License of WHCT, Hartford, Connecticut, from CBS, Inc., to Capitol Broadcasting, Inc., FCC File No. BALCT-76). This application was granted on December 23, 1958.[1]

In any event, even if Petitioners' dire predictions as to the prejudicial effect of the Commission's action on UHF television in New England were accurate, mere economic injury to Petitioners in and of itself would not have been a valid consideration for the Commission in arriving at its decision as to whether the public interest required the retention of Channel 3 at Hartford. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470.

Nor would the circumstance that its action might incidentally result in increased competition to Petitioners deprive the Commission of its authority to determine the allocation question before it in accordance with rule-making procedures conforming in all respects to the notice and hearing requirements of Section 4 of the Administrative Procedures Act, 5 U.S.C. 1003. The concepts of rule-making and adjudication "are not wholly mutually exclusive but each to a degree contains elements of the other . . . [I]t is an essence of legislation, functionally speaking, that in its immediate effect, it hurts some and benefits other members of society. . . . This is true even

[1] Another example of the ability of UHF stations in the Connecticut River Valley to command substantial prices on the market is the recent sale of WICC-AM and UHF station WICC-TV at Bridgeport, Connecticut, for a total consideration of $1,700,000 (*Broadcasting Magazine*, December 22, p. 56).

though the result of the order is of immediate and grave economic import to petitioner." *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 693-4, cert. den., 338 U.S. 860. The Commission's authority to allocate available television frequencies in the public interest through rule-making rather than adjudication is clear. *Logansport Broadcasting Corporation* v. *United States*, 210 F. 2d 24; *Peoples Broadcasting Company* v. *United States*, 209 F. 2d 286; *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194.[1]

Finally, Petitioners' contention (Pet. 16-17) that the Commission's decision was inconsistent with the results reached in other "deintermixture" proceedings involving different cities in other parts of the country is without merit. The very reason why the Commission initiated thirteen *separate* rule-making proceedings in June, 1956 was its awareness, stated at the time, that the "widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area" made it impossible to consider the interim allocation problems involved on a uniform basis. *Second Report on Deintermixture*, 13 R.R. 1571, 1582.

---

[1] Petitioners' reliance (Pet. 20) on the case of *Philadelphia Company* v. *Securities and Exchange Commission*, 175 F. 2d 808, dismissed as moot, 337 U.S. 901, is misplaced. Whereas in *Philadelphia* the sole effect of the "rule-making" was to subject a single individual to immediate and extensive regulatory action, here the Commission's paramount concern and the purpose of the rule-making proceeding was to consider whether the public interest required a change in television allocations previously approved by the Commission in an important and highly populated region of the United States (New England).

2. The decision below is not inconsistent with this Court's decision in the Chenery case.

Petitioners' second argument (Pet. 21-24), to the effect that the Court below should have set the Commission's decision aside because it rested on a mistaken interpretation of the law, is also without merit. In the first *Chenery* case, this Court held that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *Securities and Exchange Commission* v. *Chenery*, 318 U.S. 80, 87. Petitioners attempt to obscure the detailed and lengthy statement of the grounds upon which the agency's decision in the present case was based by reference to a dictum by one of the Commissioners in a dissent in another proceeding. Whatever the merits of the views attributed to Commissioner Doerfer in that case, however, they are clearly not before the Court in this. Here the agency's action in denying for the third time the request to delete Channel 3 from Hartford was based on a careful appraisal of the facts disclosed by the voluminous record before it. Its findings and conclusions went far beyond the "concise general statement" which was all that was required of it by Section 4 of the Administrative Procedure Act. *Van Curler Broadcasting Corporation* v. *Federal Communications Commission*, 236 F. 2d 727, cert. den., 352 U.S. 935. The bare legal question of the Commission's power to reallocate VHF frequencies discussed in Commissioner Doerfer's dissent in the *Fresno* case is not presented in this proceeding, since here the Commission (a) declined to make such a reallocation and (b) based its decision, not on narrow legal grounds, but on an ultimate

conclusion, supported by the record before it, that "the VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties" (Pet. App. A. 34).

3. The decision below raises no questions warranting further review by this Court.

Petitioners' contention that the decision of the court below raises "important questions" requiring further review and resolution by this Court is incorrect. The Commission's decision was based primarily on its expert appraisal of technical evidence. In such a situation, even if the same record had admitted of a contrary conclusion, this Court would not be justified in disturbing the agency's exercise of its discretion. *United States* v. *WOKO, Inc.*, 329 U.S. 223. And where the Commission's appraisal of the extensive evidence before it has been reviewed and weighed in turn by the court below, which affirmatively found the Commission's conclusions not only "rational but reasonable", this Court should "adhere to the usual rule of non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Company*, 274 U.S. 543, 544; *N.L.R.B.* v. *Pittsburgh Steamship Company*, 340 U.S. 498.

Nor are there any general questions, germane to all of the Commission's allocation proceedings, which are presented or which require determination in the context of this case. The Commission's authority to promulgate regulations implementing its public interest duties under the Act is settled,

National Broadcasting v. *United States*, 319 U.S. 190; *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, and its action here was simply a further exercise of the general rule-making authority approved in the *Logansport* and *Peoples* cases, *supra*.[1]

4. This Court's action in cases Nos. 235 and 242 (Oct. Term 1958) does not require vacation of the decision of the Court below.

Petitioners' final contention (Pet. 27-28) that the decision of the Court below should in any event be vacated and the case remanded to the Commission for further proceedings because of similar action taken by this Court earlier in cases Nos. 235 and 242 is without merit. Those cases involved the reallocation of VHF Channels in the Springfield-Peoria, Illinois area allegedly predicated, at least in part, on *ex parte* presentations to the Commission not disclosed in its decision but mooted in proceedings before Congress while the appeals were pending. The present case concerns the Commission's refusal to disturb existing long-standing allocations in an entirely different part of the country for reasons peculiar to the cities involved here and in no sense relevant, factually or legally, to the situations presented in Peoria and Springfield. The court below found the Commission's conclusions "not only rational but reasonable." And here there is no suggestion, much less an allegation, of improper *ex parte* representations to the agency. Un-

[1] ". . . [T]he Sixth Report contemplated and provided for not only a present Table of Assignments but also future amendments to that Table by the assignment of additional Channels to communities under specified rules and policies." *Van Curler Broadcasting Corporation* v. *United States*, 236 F. 2d 727, cert. den., 352 U.S. 935.

der these circumstances, there is plainly no reason to vacate the judgment of the court below. The petition for certiorari should be denied, so that repose may at last enfold this protracted litigation.

CONCLUSION

The decision of the court below is clearly correct, and raises no question calling for further review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PERCY H. RUSSELL
ALOYSIUS B. McCABE
of
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
800 World Center Building
Washington 6, D. C.

Attorneys for Respondent,
The Travelers Broadcasting
Service Corporation

December 29, 1958

APPENDIX A

FROM:

Broadcasting Magazine. October 27, 1958, p. 22:

"SPEAK FOR YOURSELF

Editor:

"First, I would like to congratulate the editors of BROADCASTING for their fine editorial [Oct. 20] on the future of uhf. Not many people these days are looking beyond the scare headlines emblazoned in the average press. I am thankful that the responsible editors of your magazine have recognized the eventual need for the uhf channels in the future.

"Second, I would like to take strong exception to comments concerning uhf in the Springfield-Holyoke market made [in that same issue] by William Dwight of WHYN-TV [UHF Channel 40]. His statement to the effect that a uhf station in that area 'cannot long continue' if vhf is permitted in the Hartford area is pure hogwash. To set the record straight as a uhf operator in the Springfield-Holyoke area, I would like to say that despite the many setbacks uhf has suffered, it still is far from being dead. And I can assure you that if I felt that WWLP could not survive vhf competition from Hartford, I would not have added another station, WRLP, nor the two translator stations we operate in northwestern New England, nor would I have revived WWOR in Worcester.

"The fact that Springfield Television Broadcasting Corp. will gross more than $1 million in sales for the second year in a row should be ample evidence that we have provided and can continue to provide successful competition to vhf stations in our market. When Mr. Dwight spoke about uhf, he could only have been speaking from WHYN-TV's standpoint and not from the standpoint of either the uhf industry or stations WWLP and WRLP.

WILLIAM L. PUTNAM, President
Springfield (Mass.)
Tv Broadcasting Corp."